

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40082
Docket No. MW-40712
09-3-NRAB-00003-080583**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Balfour Beatty) to perform Maintenance of Way and Structures Department work (track construction and related work) at approximately Mile Posts 803.45 and 804.25 on the Rawlins Subdivision beginning on April 2, 2007 and continuing (System File J-0752U-266/1478630).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intention to contract out the aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Blackie, W. Cudney, M. Munoz, E. Munoz, J. Martinez, J. McBee, S. Jenkins, A. Munoz and C. Mortimer shall now each be compensated at their respective and applicable rates of pay for an equal proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning on April 2, 2007 and continuing.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization asserts that the Carrier assigned outside forces to perform track construction and related work at approximately Mile Posts 803.45 and 804.25 on the Rawlins Subdivision beginning on April 2, 2007 and continuing. The Carrier defends on the ground that the project was owned by DOUD BTS, Inc. and that company and not the Carrier hired the contractor to perform the work.

The Carrier produced a contract between it and DOUD BTS dated May 23, 2006 which provides, in pertinent part:

“RECITALS:

The Industry [DOUD BTS, Inc.] desires the construction, maintenance and operation of a 4,127-foot Track A which is an extension of Railroad’s [the Carrier’s] Track 803, a 2,196-foot Track B and a 1,743-foot Track C (hereinafter collectively ‘Track’) at or nearby Milepost 803.48, South Pass Industrial Lead, Rawlins Subdivision, in Rock Springs, Sweetwater County, Wyoming, as shown on the attached Drawing. . . .

AGREEMENT:

* * *

Article 1. LEASE OF UNDERLYING REALTY

During the term hereof and subject to the terms and conditions set forth in this Agreement, Railroad hereby leases to Industry the portion of Railroad's right-of-way where the Industry's private section of Track is located as shown on Exhibit A (hereinafter 'Premises') in order to construct, own, keep, maintain, repair and use Industry's private section of Track.

* * *

Article 5. PORTIONS OF TRACK TO BE CONSTRUCTED BY RAILROAD.

The Railroad, at its expense, will construct and install 153 track feet of Track A using track materials supplied by the industry as set forth in Article 4 of this Agreement, remove an existing No. 10 turnout and install 120 track feet of new rail in the Railroad's main line track, and perform signal work to retire existing switch circuit controller and install new switch circuit controller on the new No. 10 turnout as shown on Exhibit A.

Article 6. PORTIONS OF TRACK TO BE CONSTRUCTED BY INDUSTRY.

- A. The Industry, at its own expense and subject to the prior approval of the Railroad, will perform all grading and install all necessary drainage facilities required in connection with the construction of the Track to the standards and satisfaction of the Railroad, and arrange to modify any overhead and/or underground utilities to meet Railroad specifications.
- B. The Industry, at its own expense, will also construct the remaining 3,974-foot portion of Track A, install a double-point

split switch derail in Track A at or near Engineering Station 4+64, install a pre-cast concrete bridge in Track A over Sweetwater Creek, and install all of Track B and Track C as shown on Exhibit A.

* * *

Article 11. OWNERSHIP OF TRACK.

- A. The Railroad shall own the portion of Track A from the point of switch to the 13-foot clearance point (hereinafter 'Railroad-owned Track').
- B. The Industry shall own the portion of Track A from the 13-foot clearance point to the end of the track and all of Track B and Track C (hereinafter 'Industry-owned Track').

Article 12. MAINTENANCE OF TRACK STRUCTURE (RAIL, TIES, BALLAST, OTHER TRACK MATERIAL).

- A. The Railroad, at its expense, shall maintain the track structure for the portion of Railroad-owned Track.
- B. The Industry, at its expense, shall maintain the track structure for the portion of Industry-owned Track.

Article 13. MAINTENANCE OF RIGHT-OF-WAY AND TRACK APPURTENANCES.

- A. The Railroad, at its expense, shall maintain the right-of-way and track appurtenances for the portion of Railroad-owned Track.
- B. The Industry, at its expense, shall perform the following maintenance of the right-of-way and track appurtenances for the portion of Industry-owned Track:
 - 1. Remove snow, ice, sand and other substances and maintain drainage and grading as needed to permit safe operation over the Track.

- 2. Maintain all appurtenances to the Track (other than an automatic signal system), including without limitation, gates, fences, bridges; undertrack unloading pits, loading or unloading devices and warning signs above, below or beside the Track.**

*** * ***

Article 22. INDUSTRY TO CONVEY OWNERSHIP OF TRACK.

- A. The Railroad and Industry hereby agree that the ownership and maintenance responsibility for the Industry-owned portion of Track A will be transferred to the Railroad effective two (2) years from the date of this Agreement. The Industry shall convey to the Railroad by Bill of Sale in the amount of ONE DOLLAR (\$1.00) good and clear title to 3,974 track feet of Track A including the bridge structure across Sweetwater Creek.**

In its claim letter of May 26, 2007, the Organization asserts the following work was improperly assigned to outside forces:

“... [C]ommencing on April 2, 2007 and continuing at this time, it [the Carrier] failed to assign the duties of constructing track and installing one (1) switch and (1) derail at approximately milepost 803.45 to 804.25 adjacent to the main line track on the Rawlins Subdivision. . . .

Commencing on April 2, 2007 and continuing ten (10) employees from the outside contracting force of Balfour Beatty . . . were given the job of preparing the site and then constructing track, installed one (1) switch and one (1) derail, hauling and distributing ballast and surfacing and lining the newly constructed track, between approximately milepost 803.45 and 804.25 on the Rawlins Subdivision adjacent to the Union Pacific, Main Line track at the same location. . . .”

The work described by the Organization in its claim is the work which DOUD BTS - and not the Carrier - was responsible to perform under Article 6 of the agreement between the Carrier and DOUD BTS. Further, that contract specifically provides that at the time the work was performed, DOWD BTS owned that portion of

the track on which the work was performed. See Articles 11 and 22 of the Agreement between the Carrier and DOUD BTS.

“ . . . As noted in Third Division Award 31234, the Board has long held that where work is not performed at the Carrier’s instigation, under its control, at its expense or exclusively for its benefit, contracting is not a violation of the Scope Rule of the Agreement.” Third Division Award 37143. Given the terms of the agreement between the Carrier and DOUD BTS, the principle in Third Division Award 37143 governs. The Carrier did not own the property or control this work when it was performed. No Agreement violation has been shown.

This claim shall therefore be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of November 2009.